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No. 80-1848

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY LOGAN, RAYMOND LASHLEY, FRANCES HOLDING, HAZEL HARPER, ARITA JUMP, ANTHONY DANIELS, and ROSA JAKE

Petitioners

v.

JAMES G. WATT, Secretary of the Interior; BENJAMIN REIFEL, Commissioner of Indian Affairs; OSAGE TRIBAL COUNCIL,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR OSAGE TRIBAL COUNCIL IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the United States District Court for the Northern District of Oklahoma, as affirmed by the United States Court of Appeals for the Tenth Circuit, correctly concluded that the power of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended.

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported at this date. (Pet. App. A-45). The opinion of the District Court is reported at 457 F. Supp. 1318. (Pet. App. A-1—A-42).

JURISDICTION

The opinion of the Court of Appeals was entered on February 3, 1981, and this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Osage Allotment Act, 34 Stat. 539, of June 28, 1906, as amended. (Pet. App. A-54).

STATEMENT

A brief statement concerning the history of the Osage Tribe of Indians would be appropriate at this time. As Petitioners acknowledge, the Osage Nation, prior to the enactment of the Allotment Act of June 28, 1906, did have a Constitution and the government consisted of a legislative judicial and executive branch. This form of government was purportedly abolished by Secretarial order, the validity thereof in said order not having been defined by judicial opinion. The Osage Reservation which is in Osage County, Oklahoma, and consisting of approximately 1,500,000 acres was purchased from the Cherokee Tribe of Indians on June 4, 1883. Payment was made from the Osages to the Cherokees as was authorized by an Act of March 3, 1873, 17 Stat. 530. The deed conveyed the Osage Reservation to the United States of America in trust for the use and benefit of the Osage and Kansas Indians. The Act of June 28, 1906, Chapter 3573, §2, 34 Stat. 539, allotted the surface of the land with certain exceptions

among 2,229 Osage Indians. Section 3 thereof reserved the mineral interests, consisting of oil, gas, coal or other minerals in communal ownership for a period of 25 years. Each allottee received a 1/2229 interest in the Osage Tribal mineral income commonly referred to as an "Osage Headright Interest." The mineral extension has been extended several times over a period of years, the latest such extension continuing "in perpetuity" by Act of October 21, 1978, 92 Stat. 1660.

This case was originally filed in the United States District Court for the District of Columbia by the Petitioners against the Secretary of the Interior and the Commissioner of Indian Affairs. The case was subsequently removed to the United States District Court for the Northern District of Oklahoma and the Respondent below, the Osage Tribal Council, was named as an additional party defendant. The complaint for declaratory relief as sought by the Petitioners below requested judgment declaring that the power of the Osage Tribal Council is limited to those matters specified by an Act of June 28, 1906, as amended. The suit further sought a finding that the federal defendants had exceeded their authority by aiding and abetting and approving the actions of the Osage Tribal Council. The Osage Tribal Council filed a Motion to Dismiss based upon lack of jusisdiction contending that Plaintiff's complaint against the Osage Tribal Council was not a matter of federal court jurisdiction, but rather an

intra-tribal dispute. This Motion to Dismiss was denied and Plaintiffs urged their Motion for Summary Judgment. The judgment was entered declaring that the powers of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended, and the opinion further declared that the funds held in trust by the United States for the Osage Tribe of Indians pursuant to the Act of June 28, 1906, may be used only as specifically authorized by Congress. (Pet. App. A-1—A-44) and an appeal was made to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision of the District Court. (Pet. App. A-45—A-54).

The Plaintiffs' suit challenged the exercise by the Osage Tribal Council to participate in various governmental programs and further that the approval by the federal defendants of the Osage Tribal's action was in excess of the statutory authority for the Secretary of the Interior and the Commissioner of Indian Affairs. The Osage Tribal Council contended in the court below that they did have programs available for members of the Osage Tribe, as well as other tribes of Indians in Osage County, Oklahoma, and that said programs were made available from the United States Department of Labor, Housing and Urban Development, Health, Education and Welfare and the United States Department of Commerce. Further, that the Osage Tribal Council was in receipt of revenue sharing funds from the appropriate governmental agency

and did disburse these funds in accordance with the laws and guidelines. The Osage Tribal Council did contend that the Osage Allotment Act of 1906 specifically delegated the matters of minerals to the Council but did not take away the Osage Tribe's inherent sovereign powers.

The District Court, in its opinion, 457 F.Supp. 1318, provided soundly and clearly the answer to Petitioners' proposition as to whether or not the Osage Tribal Council is limited to those matters set forth in the June 28, 1906 Act, as amended. The decision is concise and succinct and does not create more confusion for the Petitioners in interpreting their rights as contended in Petitioners' Petition to the Court. Petitioners are owners of "headright" interest in the mineral estate and eligible to vote in Tribal elections and the decision does not interfere with or cause "irreparable injury" as alleged.

ARGUMENT

1. The District Court's decision was not attacked by the Petitioners on the points of law on which the Court made and sustained the basis of its declarations. The District Court's decision and of which Petitioners do not contend are erroneous nor do they cite any authorities in their briefs as to the following tenets of law as found by the Court, to wit (Pet. App. A-4—A-9): (1) Indian tribes have always been considered as distinct, independent political communities; (2) Indian self-government includes

the power of an Indian tribe to operate under a form of government of the Indians' choosing; (3) the power of Congress to eliminate the powers of local self-government which tribes otherwise possess; and (4) Indian tribes possess an inherent sovereignty except where it has been taken away from them by treaty or Acts of Congress. The District Court's decision is reported in 457 F.Supp. 1318. The above principles of law aided the District Court to answer the question as to whether or not the Osage Tribal Council's authority is limited by the Act of 1906, as amended, are lawfully and ably supported by citations of case law made by the Court.

2. The decision of the District Court and Court of Appeals took the Act of 1906 and the amendments thereto for what they actually say while Petitioners apparently have turned to other sources and presumptions as to the meaning of the Act of 1906. Reference is made to the June 28, 1906 Act and Section 9 thereof, in which the Osage Tribal Council was created:

> "That there shall be a bi-annual election of officers *for the Osage Tribe* as follows: a Principal Chief, an Assistant Principal Chief, and eight members of the Osage Tribal Council, . . . " (emphasis added)

The statute says that the eight members of the Osage Tribal Council are officers for the Osage Tribe. There is no restriction that they act only in the matters of minerals.

Nowhere in the Act is there any language eliminating any powers of the Osage Tribe in the conduct of their tribal affairs. Sovereignty remains as Congress did not take it away. Reference is made to the Act of March 2, 1929, Chapter 493, Section 7, Page 1481 (45 Stat. 1478), Congress addressed the subject again on the matter of officers of the Osage Tribe using the following language:

> "Section 7: That Section 9 of the Act of Congress approved June 28, 1906, 34th Statutes at Large, Page 539, be, and the same is hereby amended to read as follows: 'That there shall be a quadrennial election of *officers of the Osage Tribe* as follows: a Principal Chief, an Assistant Principal Chief and eight members of the Osage Tribal Council to succeed the officers elected in the year 1928, said officers to be elected at a general election to be held in the Town of Pawhuska, Oklahoma, on the first Monday in June, 1930, and on the first Monday in June each four years thereafter in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of four years commencing on the first day of July following said elections and in case of vacancy in the office of Principal Chief or other such officer by death, resignation or otherwise, the vacancies of the Osage Tribal Council shall be filled in a manner to be prescribed by the Osage Tribal Council and the Secretary of the Interior is hereby authorized to remove from the Council any member or members thereof for good cause to be by him determined, after the party involved has had due notice and opportunity to appear and de-

> fend himself, *and said Tribal government so constituted* shall continue in full force and effect to January 1, 1959.' " (emphasis added).

There have been successive amendments for the continuation of the Osage Tribal Council under the 1906 Act of the present.

It is clear that the Congress not only called the Osage Tribal Council as officers of the Osage Tribe, but it further called the Osage Tribal Council and the Chief and Assistant Chief the *Tribal government.*

3. Petitioners have referred to legislative history in support of their position. In this regard, reference is made to 73 Am. Jur. 2nd Stat. 151 wherein it is said:

> "Moreover, the legislative history of the statute may not compel a construction at variance with its plain words, *Kuhner v. Irving Trust Company,* 299 U.S. 445, and where the language of the statute is unambiguous consideration of the history of the legislation is not permissible, *Fairport Railway Company v. Meredith,* 292 U.S. 589."

Also see: *Railroad Commissioners of Wisconsin v. Chicago B & O Railway Company,* 257 U.S. 563, wherein it is said:

> "Where there may be no resort to the legislative history of the enactment of the statute, the language of which is plain and unambiguous, since such legislative history may only be resorted to for the purpose of sovereign doubt and not for the purpose of creating it."

The Court said at Page 1327 of its decision (457 F.Supp. 1318) (Pet. App. A-28-29):

> "From an examination of the Osage Allotment Act, the court is lead to the conclusion that Congress intended only to expand the authority of the Tribal Council and to modify the procedure for election of Tribal officers, and neither to abolish the officers already in existence nor to create entirely new ones. It would not have been difficult for Congress to explicitly abolish the Tribal government or any part of it had that been its intent."

4. The contentions of Petitioners (Pet. App. 19, 22, 29) rests on an erroneous reading of opinions below. Federal Indian law holdings were applicable and consistent to reach the conclusion of the Courts. The matter of voting, the historical reference to an 1881 Constitution were never issues in the pleadings or briefs of the District Court until the Judgment was rendered. Petitioners do have voting rights and have no standing to challenge for rights belonging to others. *Shea v. Littleton,* 414 U.S. 488, *Eisenstadt v. Baird,* 405 U.S. 438.

That the Petition attempts to subject issues into the case that were not there before the decision and affirmation thereof. The Act as defined by the Court does not place any other Act of Congress in Constitutional jeopardy.

CONCLUSION

The decision as affirmed does not conflict with any federal decision nor State Court. The decision answered the Petitioners' question as to the authority of the Osage Tribal Council. Petitioners are making inferences and presumptions not a part of this case.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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